his shares without having first made an offer of the shares to the shareholders.

There appears to be nothing in the articles of this company which imposes on a shareholder an obligation in regard to pre-emption by existing shareholders.

I agree that, if the directors had simply expressed their opinion and the court knows nothing more about it, it would not be for the court to examine or to inquire into the ground on which they had formed that opinion.

For the purposes of the present case, I think I am only concerned with one aspect of the question.

The court must in the end ask itself a subjective question whether it is content to let the matter stand as it is, or whether there is not some lurking doubt in its mind which makes one wonder whether an injustice has been done.

As was stated by Chitty J. in *Re Bell Brothers Ltd.*(6) the power conferred on the directors by the articles of the company does not justify them in rejecting a transfer on the ground that the transferee, against whom they entertained no objection, is the proposed transferee of some person whom they consider objectionable. This decision has never been questioned and I take it to lay down the law on the subject.

Though I have much sympathy with the board of directors of the company and I think in ordinary circumstances I should have dismissed the application in their favour, since the true interests of the company would be best served by a sale to all the other members of the company and not to the proposed transferee alone, nevertheless in my judgment the law is clearly against them and I would therefore allow the application of the applicants.

I ought now to consider whether there was proper exercise by the directors of the powers vested in them and I hold there was not in as much as they have exercised it for a reason not empowered by the articles.

In the view that I take, it is not necessary for the court to engage in the determination of the other question as to whether the directors have acted *bona fide*.

The applicant has a legal right in favour of his claim and the court must give effect to it by ordering the company to register this transfer and to pay him his costs of this application

Application allowed.

NG CHENG HO v. TAN EK SENG & ANOR.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Choor Singh J.) April 16, 1969]

[Singapore—Federal Court Civil Appeal No. Y1 of 1969]

Negligence — Liability of master for safety of his workmen — Safe system of work — Common law duty.

Master and servant — Duty of master — Safe system of working.

The appellant, a lorry attendant, fell off the back of the lorry where he was with another attendant, and sustained injuries. He sued both the driver of the lorry and his employer. The trial judge held that appellant had failed to prove that his injuries were caused by the negligence of the first respondent or by any breach of any statutory duty on the part of the second respondent. He found that the appellant fell off the lorry because he had failed to look after his own safety and that the accident was due to his sole negligence. On appeal, the appellant contended that the respondents being under a common law duty to take reasonable care to provide a reasonably safe system of work had failed in the circumstances prevailing at the time to do so.

Held, dismissing the appeal: in this case the appellant had not only failed to allege what was the defect in the system but he also failed to prove any defect in the system provided by the second respondent. Furthermore, on the facts there was not only no defect in the system provided but also, on the appellant's own admission, the accident would not have occurred had he adhered to the system provided.

Case referred to:—

(1) *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] 1 All E.R. 326.

FEDERAL COURT.

Ng Kian Fong for the appellant.

C.S. Wu for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The appellant was employed by the second respondent as a lorry attendant. His duties were to load sand from a sand-pit on to a lorry and to accompany the loaded lorry to its destination. He had been so employed by the second respondent for a period of two years prior to the day of the accident.

On the day of the accident he was the attendant of a lorry No. SG 3284 belonging to the second respondent which was being driven by the first respondent who was also an employee of the second respondent. This lorry on that day was being used to load sand from a sand-pit which was situate at the end of an earth road off Peng Ann Road. This earth road which was 15′ 10″ wide sloped down from Peng Ann Road to the sand-pit and was full of pot holes of varying widths and depths.

The appellant was the regular attendant of that lorry but on that day accompanying him was another lorry attendant employed by the second respondent. This other lorry attendant

also accompanied the lorry because his regular lorry was not being used that day and he was asked to assist the appellant.

On the day of the accident, after sand had been loaded on to the lorry, it left the sand-pit and made its way up the pot-holed earth road towards Peng Ann Road and as it was so travelling the appellant fell off the back of the lorry, where he was with the other lorry attendant, and sustained injuries.

The appellant sued both the driver of the lorry and his employer. In his statement of claim he alleged that the accident was caused by the negligence and/or breach of statutory duty of the first-named defendant and by the negligence and/or breach of statutory duty of the second-named defendant his servants or agents or alternatively by the negligence and or breach of statutory duty of one or other of them in the driving control management use and or loading of the said vehicle.

At the trial his evidence was that his job was to load sand on to the lorry at the sand-pit and after it had moved off he was levelling the sand, as usual, at the back of the lorry. When the lorry had travelled very fast up the slope for a distance of about 200 feet the lorry went into a pot-hole and he fell off while he was still standing and working at levelling the sand. The other lorry attendant was with him at the back of the lorry. He admitted there was a railing immediately above the driver's cabin which was provided for the attendant to hold on to but denied that the usual practice was for the sand to be levelled off before a loaded lorry moved off from a sand-pit. He agreed that if he was holding on to the railing or was sitting on the sand he would not have fallen off that day and that while going up the slope he felt several bumps. He said that after he fell off, the lorry reversed and one of the front wheels ran over his leg. The injuries he suffered was a compound comminuted fracture of the midshaft of the left femur.

Both respondents gave evidence that the usual practice was that after sand had been loaded on to a lorry, the sand on the lorry would be levelled before the lorry moved off from the sand-pit. The reason for this practice was that the owner of the sand-pit sells his sand and is paid by the lorry load and he requires the sand on the lorry to be levelled off. The trial judge accepted the respondents' evidence that it was the appellant's duty to level the sand while the lorry was at the sand-pit and before it moved off and not while the lorry was in motion. The trial judge also found that while it was the appellant's duty to travel at the back of the lorry he would not have fallen off had he held on to the railings or had sat down on the sand. The trial judge found that the appellant had failed to prove that his injuries were caused by the negligence of the first respondent or by any breach of any statutory duty on the part of the second respondent. He found that the appellant fell off the lorry because he had failed to look after his own safety and that the accident was due to his sole negligence.

The appellant contends before us that the respondents being under a common law duty to take reasonable care to provide a reasonably safe system of work had failed in the circumstances prevailing at the time to do so. It is plain that this appeal cannot succeed against the first respondent, who is a fellow employee and not the employer of the appellant.

The common law duty of a master to his servant, arising out of the relationship of master and servant is stated at paragraph 976 of *Halsbury's* Laws of England (3rd edition) Volume 25 as follows:—

> "A master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his work-people in all the circumstances of the case so as not to expose them to an unnecessary risk. The master does not warrant the safety of the working conditions, nor is he an insurer of his servants' safety; the exercise of due care and skill suffices. The duty to exercise reasonable care is, however, one which is personal to the master, and if he entrusts its performance to a servant, agent or, it seems, an independent contractor, he is vicariously liable for any negligence on the part of the person so appointed in performing the duty. In order to succeed in an action for damages against his master, a workman must show that his injuries were caused by the master's breach of duty, the onus being upon him to establish both the breach of duty and the fact that the breach was the cause of his injuries."

One aspect of that duty is to take reasonable care to provide a reasonably safe system of carrying on the relevant operation but the mere happening of an accident does not show that anyone (either the master or any one for whom he is vicariously responsible) has been negligent or that there is any defect in the system of working. A servant who sues his master must allege and prove specifically what is the defect in the system of which he complains. It is not sufficient that the system adopted was in fact unsafe, he must show something which could reasonably have been done or omitted which would have made the system reasonably safe and that this failure was the cause of the accident (see Lord Goddard C.J. in the Court of Appeal and Viscount Simon L.C. in the House of Lords in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.*[1]).

In the present case, the appellant has not only failed to allege specifically what is the defect in the system of which he complains but he has also failed to prove any defect in the system provided by the second respondent for

him to carry out his work as the lorry attendant of a lorry engaged in obtaining a load of sand from a sand-pit and transporting the loaded lorry to another place. Furthermore, on the facts there was not only no defect in the system provided but also, on the appellant's own admission, the accident would not have occurred had he adhered to the system provided. The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Director of Legal Aid; Donaldson & Burkinshaw.*

MUNUSAMY v. SUBRAMANIAM & ORS.

[O.C.J. (Abdul Hamid J.) April 17, 1969]

[Seremban — Originating Summons No. 1 of 1969]

Practice and Procedure — Habeas Corpus — Application by originating summons — Whether High Court has power to issue writ of the nature of habeas corpus — Courts of Judicature Act, 1964, s. 25 — Criminal Procedure Code (Cap. 6), s. 365 and Chapter XXXVI — Constitution of Malaysia, art. 5(2).

In this case the applicant had applied by originating summons for an order or writ of *habeas corpus* to be issued for the production of the body of one Rajammah. The first and third defendants brought a motion for an order that the application be struck out. It was argued that the application was wrongly brought by originating summons and that the application should have been made under Chapter XXXVI of the Criminal Procedure Code (Cap. 6).

Held, dismissing the application: (1) the power to issue directions, orders or writs including writs of the nature of *habeas corpus* for the enforcement of any of the rights conferred by Part II of the Constitution of Malaysia are specifically provided as an additional power for the High Court under section 25 of the Courts of Judicature Act, 1964, but such power must be exercised in accordance with any written law or rules of court relating to the same;

(2) the only written law relating to directions of the nature of *habeas corpus* is to be found in Part XXXVI of the Criminal Procedure Code and therefore the proper procedure in this case would be for the applicant to apply under section 365 of the Criminal Procedure Code and not by the *ex parte* originating summons in chambers.

Cases referred to:—

(1) *District Magistrate, Trivandrum* v. *Mappillai & Ors* A.I.R. 1939 Mad. 120.

(2) *Matthen & Ors.* v. *District Magistrate, Trivandrum* L.R. 66 I.A. 222; A.I.R. 1939 P.C. 213.

MOTION.

Gurdial Bakan Singh for the applicant.

N. Ramachandran for the respondents.

Cur. Adv. Vult.

Abdul Hamid J.: This is a motion by the 1st and 3rd respondents asking for an order that the whole of the application for an order that a writ of *habeas corpus* be issued requiring the body of Murugammah Rajammah alias Rajammah d/o Arumugam to be brought by her mother Karthaie or her brother Subramaniam s/o Arumugam, or her father Arumugam, or her brother Shanmugam s/o Arumugam, or any other member of their family, or by their servants or agents before the judge in chambers and set at liberty (to enable her to choose a person of her own choice as her husband), be struck out on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious and an abuse of the process of the court.

At the hearing of this motion, counsel for the respondents raised an issue which to my mind is of some considerable importance, i.e. whether the application for the writ can be proceeded with by way of originating summons, in the absence of any provision governing the same in the Rules of the Supreme Court and also in view of the legislative provisions under Chapter XXXVI of the Criminal Procedure Code (Cap. 6).

Counsel for the applicant concedes that there is no provision in the Rules of the Supreme Court governing applications of this nature, however, he argued that by virtue of Order 72 rule 2 application may be made by way of originating summons. He further submitted that in view of article 5(2) of the Federal Constitution, the court has jurisdiction to hear the application.

Counsel for the respondents submitted that section 365 of the Criminal Procedure Code is somewhat similar to section 491 of the Indian Criminal Procedure Code, and the application may perhaps be properly made under this section. He further submitted that the provisions of the English common law as exercised by the King's Bench Division of the High Court of Justice in England do not apply. He cited the following cases to support his argument: (a) *District Magistrate, Trivandrum* v. *Mappillai & Ors.*[1] (b) *Matthen & Ors.* v. *District Magistrate, Trivandrum.*[2]

In *District Magistrate, Trivandrum* v. *Mappilla & Ors.*, the matter referred for consideration of the Full Bench was whether the High Court or any judge of it can issue a common law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code. It was held in that case that:—

"By Acts of the Legislature lawfully passed in 1875 and subsequent years the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Criminal Procedure Code. Hence, the High Court or any judge of it cannot issue the common law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code."